STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court Of Appeals
(Cavanagh, P.J., and Jansen and Fort Hood, JJ.)

JOSIP RADELJAK, Personal Representative, Estate of ENA BEGOVIC, Deceased; JOSIP RADELJAK, Individually and as Next Friend of LANA RADELJAK; LEO RADELJAK and TEREZA BEGOVIC,

Plaintiffs-Appellees,

-v-

DAIMLERCHRYSLER CORPORATION,

Defendant-Appellant.

Supreme Court No. 127679

Court of Appeals No. 247781

Lower Court
Case No: 02-228401-NP

/

REPLY BRIEF ON APPEAL—APPELLANT DAIMLERCHRYSLER CORPORATION

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I. INTRODUCTION

The stakes in this appeal go far beyond this individual case. Plaintiffs, who are citizens and residents of Croatia, assert that they should be able to bring suit in Michigan, based upon an accident occurring in Croatia, with claims governed by Croatian law, simply because the defendant manufacturer's headquarters are located in Michigan. The necessary implication of Plaintiffs' argument is that *any* incident, involving *any* product, occurring anywhere in the world, can give rise to a lawsuit here in Michigan, so long as the product's manufacturer has facilities here. The inconvenience—and unfairness—that such litigation would cause Michigan defendants is plain enough. But even worse would be the crushing burden imposed on Michigan's court system if this Court invites cases like this one to be filed here.

This case, therefore, is not about simply whether certain documents relevant to Plaintiffs' claims are located in Michigan. The case is instead about whether Michigan will be Courthouse to the World. This Court should prevent that result.

II. PLAINTIFFS' ARGUMENTS ARE MERITLESS

Plaintiffs nowhere discuss in their brief the impact that cases like this one would have on Michigan's courts if this Court allows them to be litigated here. Numerous courts, including the United States Supreme Court, have observed that American courts "are extremely attractive to foreign plaintiffs[.]" *Piper Aircraft Co. v. Reyno,* 454 US 235, 252 (1981). The pool of prospective plaintiffs worldwide is immense. And this Court's decision in this case will be the clearest signal yet as to whether the great mass of potential foreign lawsuits can be filed here. That Plaintiffs have nothing to say regarding the consequences of the decision they advocate is evidence that those consequences would be dire indeed.

The arguments that Plaintiffs do offer are unpersuasive, with some having already been rejected by this Court or by the United States Supreme Court in *Piper*.

A. Plaintiffs' Claims Were Properly Dismissed On *Forum Non Conveniens* Grounds

Plaintiffs first argue that DaimlerChrysler Corporation ("DCC") submitted insufficient proofs in support of its motion—filed, per the preference of this Court and others, simultaneously with its Answer in the case, and prior to any discovery—to dismiss on *forum non conveniens* grounds. Plaintiffs overlook, however, that the very point of such a motion is that such proofs are exceedingly difficult to obtain in a case arising in another country. The United States Supreme Court made this point clear in *Piper Aircraft:*

> [The lower court] suggested that defendants seeking *forum non conveniens* dismissal must submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum. *Such detail is not necessary.* Piper and Hartzell have moved for dismissal precisely because many crucial witnesses are located beyond the reach of compulsory process, and thus are difficult to identify or interview. *Requiring extensive investigation would defeat the purpose of their motion.*

454 US at 258 (emphasis added; footnote omitted). The same is true here.

With respect to the *Cray* factors themselves, Plaintiffs primarily argue that this case should be litigated here because certain design documents are located in Michigan or elsewhere in the United States. Plaintiffs' Brief at 13-14. But the same was true in *Piper Aircraft, see* 454 US at 257 ("records concerning the design, manufacture, and testing of the propeller and plane are located in the United States"), and the Supreme Court found there that the private-interest factors easily supported dismissal. *See id* at 258-59.

Moreover, Plaintiffs overlook that, if this case were litigated in Croatia, witnesses and documents in Michigan would be readily available to them (and their Michigan counsel) under MCR 2.305(E) (authorizing subpoenas for depositions and document production in connection

with an "action pending . . . in another country"). In contrast, if the case were litigated in Michigan, witnesses and documents in Croatia would be available only pursuant to the issuance of letters rogatory, which even Plaintiffs concede "would be a very complicated matter involving the Hague Convention." Plaintiffs' Brief at 13. The need to navigate that Convention—as opposed to the simple procedures of MCR 2.305(E)—is reason enough not to litigate this case here.

B. Plaintiffs' Criticisms Of The Doctrine's Validity Are Meritless

Plaintiffs devote much their brief to criticizing the *forum non conveniens* doctrine in general, arguing it is unconstitutional and otherwise problematic. None of these arguments were presented below, since Plaintiffs merely argued that the *Cray* factors supported litigation of this case in Michigan, not that the doctrine itself was invalid. *See* Plaintiffs' Court Of Appeals Brief at 7-16. Plaintiffs' arguments regarding the doctrine's validity thus fall within "the well-established rule that issues not presented to the trial court or the Court of Appeals are not preserved for review by this Court." *Bitar v Wakim,* 456 Mich 428, 435 n 2; 572 NW2d 191 (1998).

Plaintiffs' arguments are also meritless. Plaintiffs assert, for example, that the doctrine of *forum non conveniens* violates Article 3, Section 7 of the 1963 Michigan Constitution. Plaintiffs say this is so because the doctrine, as adopted in *Cray v General Motors Corp,* 389 Mich 382; 207 NW2d 393 (1973), changed the common law of Michigan. *See* Plaintiffs' Brief at 23. That is true enough, but Article 3, Section 7 provides that the State's common law and statutes "now in force . . . shall remain in force *until* they expire by their own limitations, or *are changed*, amended, or repealed." (Emphasis added.) Thus, rather than forbid any post-1963 evolution of the common law, this provision expressly permits the sort of change effected by *Cray.*

Plaintiffs further allude to various problems allegedly created by the "jurisdictional" nature of the rule in *Cray*. For example, Plaintiffs suggest that a motion to dismiss on *forum non conveniens* grounds might be pressed upon the court after extended litigation in a case, since "trial courts are powerless to require jurisdictional issues to be raised within any court-imposed deadlines." Plaintiffs' Brief at 29. But *Cray* expressly includes "reasonable promptness in raising the plea of Forum non conveniens" as a factor for the court to consider in determining whether to apply the doctrine. 389 Mich at 396. And contrary to Plaintiffs' apparent assumption, the *Cray* Court did not hold that a trial court is *without* jurisdiction in cases where *forum non conveniens* is properly applied. Rather, the *Cray* Court—and, to DCC's knowledge, every other court to have applied the doctrine—held that "it is within the discretion of the trial judge to *decline* jurisdiction in such cases as the convenience of the parties and the ends of justice dictate." 389 Mich at 396 (emphasis added). The distinction between lacking jurisdiction and declining to exercise it is plain; and that distinction cuts through the various "jurisdictional" hazards cited by Plaintiffs in their brief.

C. Plaintiffs' Criticisms Of DCC's Proposed Enhancement Of The *Cray* Public-Interest Factors Are Meritless

Plaintiffs do not offer any proposed revision of the *Cray* public-interest factors in response to this Court's request for briefing on that subject. Instead, Plaintiffs criticize DCC's proposed revision of those factors. Plaintiffs' criticisms are meritless.

In its Opening Brief, DCC argued that the *Cray* public-interest factors should be expanded as suggested by Justice Markman in *Present v Volkswagen of America, Inc.*, 462 Mich 908; 612 NW2d 158 (2000), to include consideration of "the extent to which accommodating the instant lawsuit in Michigan will have consequences for the number and types of future lawsuits heard by Michigan courts." *Id.* DCC further argued that, given certain factors common to cases

like this one, the *Cray* analysis should almost always require dismissal of such cases on *forum non conveniens* grounds.

Plaintiffs assert that the latter argument, if adopted by this Court, would create a "discriminatory scheme based on national origin," Plaintiffs' Brief at 36, which Plaintiffs presumably think violates the Equal Protection Clause of the United States Constitution. This assertion does not withstand scrutiny.

The factors cited by DCC as grounds for uniform (which is to say, lawful) treatment of cases like this one have little to do with "national origin." DCC noted that, in such cases, Michigan courts will lack powers of compulsory process over persons or things in the country in which the case arose, requiring the use of letters rogatory; that the defendant will be unable to implead potentially responsible parties in the plaintiff's home country, a factor deemed "crucial" by the *Piper Aircraft* Court, 454 US at 259; that the Michigan court will be faced with the task of "untangl[ing] problems in conflicts of laws, and in law foreign to itself[,]" *Gulf Oil Corp. v Gilbert,* 330 US 501, 508 (1947); that the country in which the case arose will have a greater interest in the case than does Michigan; and that the staggering implications of accommodating cases like these will always be present. None of these factors concern national origin for its own sake, and consideration of them is not "discrimination," but common sense.

The *only* factor (which is actually a rule) cited by DCC that directly relates to the plaintiff's residence or citizenship, is that a foreign plaintiff's choice of forum will be entitled to little if any deference. But the United States Supreme Court itself announced this rule, *see Piper Aircraft,* 454 US at 256 ("a foreign plaintiff's choice [of forum] deserves less deference"), which has since been followed in literally dozens of cases. *See, e.g., Stewart v. Dow Chemical Co.,* 865 F.2d 103, 106 (CA6 1989). Indeed the Court flatly stated that, in the context of *forum non*

conveniens, the "*distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified.*" 454 US at 255 (emphasis added).

The reason this distinction is fully justified is simple: When a plaintiff chooses to file suit in a country other than the one in which he resides or in which the case arose, it is clear enough that his choice of forum is based on reasons other than convenience. The Court explained:

> When the [plaintiff's] home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

454 US at 255-56. This too is not "discrimination" on the basis of national origin for its own sake. It is, again, common sense.

It also bears mention that the author of the Court's opinion in *Piper Aircraft* was Justice Thurgood Marshall. Justice Marshall was, of course, well aware of the constraints imposed by the Equal Protection Clause, having successfully argued *Brown v Board of Education,* 347 US 483 (1954), among other things. The rule he stated, and the rule proposed by DCC here, do not violate those constraints.

Finally, Plaintiffs state that DCC's proposed rule is "vastly overbroad," because "[i]f Michigan defendants wish to avoid state courtrooms and provincial limitations on the state court system's authority," they can "remove the action to federal court." Plaintiffs' Brief at 37. This statement is incorrect in virtually every possible respect.

As an initial matter, the issue here is not state-court "provincialism." Federal courts have no greater powers of compulsory process over witnesses and things in Croatia than do Michigan ones. Nor is a defendant in a federal case more able to implead a responsible Croatian party than

a defendant in a Michigan case can. The very existence of the *Piper Aircraft* opinion, and the United States Supreme Court's recital there of the same problems that DCC recites here, shows that removal to federal court will not remedy the unfairness created by this kind of case.

Nor was removal even an option here. Plaintiff is simply wrong to assert that DCC could have "remove[d] the action to federal court under 28 USC § 1446." Plaintiffs' Brief at 37. Section 1446 concerns the "*Procedure* For Removal[.]" A different section, § 1441, describes the cases that are *subject to* removal. And § 1441(b) plainly states that a case over which the district court would have diversity but not federal-question jurisdiction—of which this would be one—"shall be removable *only if none of the parties* in interest properly joined and served as defendants *is a citizen of the State in which such action is brought.*" (Emphasis added.) *See also, e.g., Hurt v Dow Chemical Corp.*, 963 F2d 1142, 1145 (CA8 1992) (applying plain text of §1441(b)). Thus, other than federal-question cases, a Michigan defendant cannot remove a lawsuit filed in Michigan state court.

The remedy that Plaintiff proposes for "Michigan defendants," therefore, is foreclosed by the plain text of the applicable federal statute. The only real remedy—both for Michigan defendants and Michigan's courts—is for this Court to prevent these suits from being filed in the first place.

III. CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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